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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1942

## No. 377

RONNING MACHINERY COMPANY and the GALION IRON WORKS AND MANUFACTURING COMPANY,

*Petitioners and Appellants Below,*

vs.

CATERPILLAR TRACTOR CO.,

*Respondent and Appellee Below.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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# In the Supreme Court
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No. 377

Ronning Machinery Company and the Galion Iron Works and Manufacturing Company,
*Petitioners and Appellants Below,*
vs.
Caterpillar Tractor Co.,
*Respondent and Appellee Below.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### OPINIONS BELOW.

The opinion of the District Court for the Southern District of Illinois appears at page 53 of the record and is reported in 38 Fed. Supp. 783. The opinion of the Circuit Court of Appeals for the Seventh Circuit appears at page 3065 of the record and is reported in 129 Fed. (2d) 70.

## JURISDICTION.

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U.S.C. 347).

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## QUESTIONS PRESENTED.

Petitioners having failed in their duty of setting forth in their petition and brief the precise question or questions presented, such duty is cast upon respondent. Furthermore, even a cursory review of the petitioners' brief will reveal that no questions of law are raised, but that the petition is but an attempt to have this Court review merely *questions of fact that have been decided adversely against petitioners by two separate District Courts and by two different Circuit Courts of Appeals.*

This is an ordinary patent suit involving no unusual features, no conflict of decision between Circuit Courts of Appeals, nor any new or unusual questions of law. On the contrary, there is complete unanimity of decision between two Circuit Courts of Appeals as shall be hereinafter pointed out.

The sole questions presented by the petition and brief are:

(1) Whether certiorari will be granted to review *concurrent findings of fact* by the Illinois District Court and the Seventh Circuit Court of Appeals that respondent's accused machines did not infringe the Winsor patent, the only patent referred to in the petition, particularly where, as here, *identical* findings of fact with respect to the *same* machines had theretofore been made by the District Court

for the Western District of Pennsylvania and approved by the United States Circuit Court of Appeals for the Third Circuit in an infringement suit involving the *same* patent.

(2) Whether certiorari will be granted to review the findings of fact of the Seventh Circuit Court of Appeals to the effect that the Winsor patent lacks invention and is invalid, when in so doing that Circuit Court of Appeals violated no established rule of law, but merely followed the law as expressed in numerous cases by this as well as other Courts.

The petitioners contend that the Seventh Circuit Court of Appeals erred in holding against them on the question of infringement, because of said Court's alleged failure to compare the claims of the Winsor patent with the accused devices. They also contend that such Court erred in deciding that the combination of elements of the Winsor patent was void for lack of invention.

Respondent disputes all of these contentions. The question of infringement of the Winsor patent was argued before the Illinois District Court and the Seventh Circuit Court of Appeals, as well as before the District Court for the Western District of Pennsylvania and the United States Circuit Court of Appeals for the Third Circuit, and each of those Courts found the facts to be contrary to petitioners' contentions herein and resolved them in favor of respondent.[1] The question of invention in the

[1]It should be noted that *Galion* is the only real petitioner herein, the same Galion as brought the suit in Pittsburgh. The Ronning Machinery Company is included only because in the case below other patents were sued on, not being included in the petition.

Winsor patent was thoroughly argued and presented to the Illinois District Court and to the Seventh Circuit Court of Appeals below, and the Seventh Circuit Court of Appeals decided contrary to petitioners' contentions herein and resolved them in favor of respondent.

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## STATEMENT OF THE CASE.

Petitioners' summary statement of the matter involved is such that it needs correcting and supplementing.

On April 7, 1923, the application for Winsor patent No. 2,020,271 was filed, the application being entitled "Tractors and *Attachments Therefor*".[2] This application remained pending in the Patent Office more than *twelve years,* being issued on November 5, 1935.[3]

In 1930, respondent, Caterpillar Tractor Co. (hereinafter called Caterpillar), commenced the design of its Auto Patrol, one of the machines accused of infringing the Winsor patent herein, and this machine appeared on the market commencing in 1931.[4]

Approximately *four years after* respondent's Auto Patrol had been on the market and *twelve years after* the application for the Winsor patent had been filed, and in July and September, 1935, the application was amended and most of the claims sued on herein were inserted in the application for the first time.[5] At the same time the

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[2]R. Vol. II, p. 1321.
All italics herein may be deemed respondent's.
[3]R. Vol. IV, p. 2298.
[4]R. Vol. I, p. 560.
[5]R. Vol. II, pp. 1469 to 1483, 1499 to 1502.

title of the application was changed from "Tractors and Attachments Therefor" to "Road Working Machine"[6] and the patent allowed to issue.

Immediately following its issuance and on November 21, 1935, the Galion Iron Works and Manufacturing Company (hereinafter called Galion), one of the petitioners herein, notified Caterpillar of the alleged infringement thereof.[7] Upon receipt of this letter, negotiations were had between Galion and Caterpillar in an endeavor to arrive at a settlement of the controversy, and in July, 1936, the parties being unable to compromise their difficulties, the settlement negotiations were concluded.[8]

Thereafter, in August, 1936, Galion brought a suit in the United States District Court for the Western District of Pennsylvania against the Beckwith Machinery Company,[9] a distributor for Caterpillar, because of the sale by Beckwith of the Caterpillar Auto Patrol,[10] *the identical machine accused of infringement herein.* The defense of this suit was immediately undertaken by Caterpillar.[11]

In April of 1938, the Pittsburgh case was tried before Honorable F. P. Schoonmaker, District Judge, resulting in a decision in favor of the defendant, the trial Court holding that the Caterpillar Auto Patrol was not an infringement of the Winsor patent.[12] The trial Court at

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[6]R. Vol. II, p. 1469.
[7]R. Vol. II, p. 1223.
[8]R. Vol. II, pp. 781 to 783; Defendant's Exhibit 117, R. Vol. III, p. 1781.
[9]R. Vol. III, p. 2086, hereinafter referred to as the Pittsburgh suit.
[10]R. Vol. III, p. 2083.
[11]R. Vol. II, p. 784.
[12]*Galion Iron Works and Mfg. Company v. Beckwith Machinery Co.*, 25 Fed. Supp. 73.

Pittsburgh also rendered its Findings of Fact and Conclusions of Law,[13] many of which are identical with the facts as found by the District Court herein,[14] and entered a decree dismissing the Bill of Complaint.[15]

The District Court in the Pittsburgh suit found it unnecessary to pass on the validity of the Winsor patent in view of its decision on the question of infringement.

Following this decision and decree, Galion took an appeal to the United States Circuit Court of Appeals for the Third Circuit. That Court approved the findings of the District Court and rendered its opinion affirming the District Court's adjudication of non-infringement.[16]

Following this decision and in an endeavor to relitigate the identical issues adjudicated adversely to it in the Pittsburgh suit and on November 24, 1939, Galion instituted this action against respondent, wherein it was again contended that respondent's road graders, known and designated as Auto Patrols and Motor Graders, infringed the Winsor patent. The complaint was amended several times, and on March 3, 1941, after a protracted hearing of many days' duration during which time numerous witnesses testified and vast numbers of exhibits were introduced, the Illinois trial Court entered its judgment whereby the complaint herein was dismissed.[17]

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[13]R. Vol. III, pp. 2024-2025.
[14]See Findings 2, 4, 5, 6 and 7 herein, R. Vol. III, pp. 2222-2223.
[15]R. Vol. III, p. 2023.
[16]*Galion v. Beckwith*, 105 Fed. (2d) 941.
[17]R. Vol. III, p. 2225.

Prior to the entry of the judgment as above set forth, the trial Court rendered a written opinion[18] and made and entered its Findings of Fact and Conclusions of Law.[19]

The trial Court found, as had the previous District Court in Pittsburgh and the Third Circuit Court of Appeals, that the accused Auto Patrols and Motor Graders did not infringe the Winsor patent herein for the reasons set forth in its opinion and in its Findings of Fact and Conclusions of Law.

The trial Court did not deem it necessary to pass on the validity of the Winsor patent, although its findings clearly indicate the trial Court's belief in the lack of validity thereof.[20]

From the judgment dismissing the complaint, petitioners took their appeal to the United States Circuit Court of Appeals for the Seventh Circuit.[21] Following a full and complete hearing, the Circuit Court of Appeals, after reviewing the facts, held the Winsor patent to be void for lack of invention[22] and affirmed the judgment of the District Court. In addition, the Circuit Court of Appeals agreed with the trial Court, the District Court in Pittsburgh and the Circuit Court of Appeals for the Third Circuit that the accused machines herein were not an infringement of the Winsor patent.

Thereafter a petition for rehearing was filed, which was denied without comment on July 16, 1942.[23]

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[18]R. Vol. I, p. 53.
[19]R. Vol. III, p. 2222.
[20]R. Vol. III, p. 2223.
[21]R. Vol. III, p. 2228.
[22]R. Vol. IV, p. 3065.
[23]R. Vol. IV, p. 3072.

**BRIEF COMMENT ON THE REASONS RELIED ON BY PETITIONERS IN SEEKING THE WRIT.**

Preliminarily, it should be noted from the facts heretofore set forth that there is no conflict of decision between any Circuit Courts of Appeals on the same matter, but on the contrary, the only two Circuit Courts of Appeals that have had an opportunity to pass on the same questions involving the same patent and the same accused machines *are in complete accord and agreement* on the question of lack of infringement. This petition, therefore, is but an attempt to obtain a further review of a usual suit for the infringement of a patent decided adversely to petitioners in two Circuit Courts of Appeals.

In addition we have herein two District Courts, rendering substantially identical fact findings with respect to a controversy involving an identical patent and an identical accused machine. Thus, eight judges have concurred without a dissent, in the finding that the accused machines herein are not an infringement of the Winsor patent.

That the ascertainment and declaration of lack of identity between an accused machine and the alleged invention of a patent, or in other words, non-infringement is a fact finding as distinguished from a conclusion of law, is so well settled as to hardly require citation of authorities. However, a few of the authorities so holding are set out below.[24]

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[24] *United States v. Societe Anonyme, etc., Cail*, 224 U.S. 309, 322;
*Leeds & Catlin Co. v. Victor Talking Machine Co.*, 213 U.S. 301, 312;
*Stilz v. United States*, 269 U.S. 144, 147.

This Court, under a long established rule, has declared that it will accept the concurrent findings of the Courts below, except in a case of clearest error,[25] and it is well settled that the function of a writ of certiorari is not to review disputed and controverted fact questions which have been decided.[26] *A fortiori* should this be true where, as here, the very fact findings under attack have been concurred in by two other lower Courts.

This in and of itself should be a clear answer to the petition herein. However, for sake of completeness we shall answer the main reasons asserted by petitioners for the granting of their petition. In so doing, however, we will not attempt to analyze the evidence or point out the many erroneous statements with regard thereto that appear in petitioners' brief, believing that such a discussion is of no aid to this Court in a consideration of the question now before it.

The reasons relied on by petitioners in seeking the writ herein are apparently those under the heading "Argument",[27] and listed as Points A to G, inclusive. They can be readily divided into two groups, namely Points A to D, directed to the alleged error of the Courts below in holding the Winsor patent not infringed, and Points E to G, directed to the alleged error of the Seventh Circuit Court of Appeals in holding the Winsor patent invalid.

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[25] *Charleston, S. C. Min. & Mfg. Co. v. United States*, 273 U.S. 220, 223, and the many cases cited therein.

[26] *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178, 179;
*United States v. Johnston*, 268 U.S. 220, 227;
*Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509.

[27] Petition and Brief, p. 9.

For their first reason, designated Point A, petitioners contend that neither the lower Courts, respondent nor respondent's expert has set forth the manner in which the accused machines differed from the Winsor patent.[28] In this the petitioners are in error.

Respondent has earnestly and vigorously asserted throughout all of this litigation from the Pittsburgh case to the final argument of this cause that not one of the claims of the Winsor patent, when properly construed, reads on the accused machines. In its briefs and arguments before the District Court in Pittsburgh, the Circuit Court of Appeals for the Third Circuit, the trial Court herein and the Seventh Circuit Court of Appeals, respondent pointed out in detail the manner in which the accused machines differed from any combination of parts found in the Winsor patent. And each of those Courts agreed with respondent.

A very substantial part of the testimony by respondent's expert was directed to that very subject matter and he gave testimony at some length pointing out the manner in which the claims of the Winsor patent failed to read on the accused machines, which testimony was, of course, the very foundation for respondent's arguments.

The opinion of the District Court judge in the Pittsburgh suit[29] discusses and analyzes the Winsor patent most thoroughly, quotes claim 31 thereof and in some detail points out the manner in which the accused machines differ therefrom.

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[28]Petition and Brief, pp. 9, 15 and 16.
[29]25 Fed. Supp. 73.

Likewise the opinion of the Third Circuit Court of Appeals[30] quotes claim 31 and with careful analysis sets forth the reasons why there is no infringement.

In addition, in the opinion of the District Court herein[31] is found statements setting forth the limitations in the claims of the Winsor patent which preclude a finding of infringement. The findings of fact herein also expressly set forth the limitations in the Winsor claims which petitioners choose to ignore.[32]

Thus we have three reported decisions, each one of which does what petitioners say it does not, and each of the three opinions referred to is in accord. Obviously under these circumstances, and in view of the Seventh Circuit Court of Appeals' decision herein on the question of invalidity, it was manifestly unnecessary for that Court to burden already overburdened published reports by repeating what had been said thrice before. Therefore, in connection with the question of infringement, that Court adopted the reasoning of the three prior decisions and said:

> "If we were wrong in our conclusion as to invalidity, in view of the prior art, we would be compelled to restrict the patents to the specific constructions mentioned in the respective claims, and, in that case, to agree with the District Court that, under such construction, the devices complained of are not within the scope of the claims sued upon, as pointed out by the trial court and by both the District Court and the

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[30]105 Fed. (2d) 941.
[31]R. Vol. I, p. 53.
[32]R. Vol. III, pp. 2222-2223.

Court of Appeals in *Galion v. Beckwith,* 25 Fed. Supp. 73 and 105 Fed. (2d) 941" (citing cases).[33]

From the foregoing it is apparent that there is no foundation in fact for petitioners' erroneous assumption presented under Point A, and it is entirely devoid of merit.

As their second and third points, designated Points B and C,[34] petitioners attempt to find some alleged conflict or inconsistency in the *Seventh Circuit,* between the instant case and two other cases.[35] That there is no conflict of decision or inconsistency will become at once apparent when it is realized that the parties, issues, evidence and facts in those cases were entirely different from the case at bar. Obviously each case must be decided on its own facts and on the evidence before the Court in each case. The Adams cases could not be decided on the evidence in this case, nor could this case be decided on the evidence in the Adams cases.

The first Adams case[36] was a suit *not* for the infringement of a patent, but a *suit to recover royalties due under a license contract,* Adams being a licensee under the Winsor patent. In that case the Court, correctly or otherwise, did not determine the scope to be given the Winsor patent in infringement litigation, but merely held that the Adams machines were within the scope of the Winsor claims *literally construed.* In the instant case the lower Court

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[33]R. Vol. IV, p. 3070.
[34]Petition and Brief, pp. 9, 10 and 16 to 18.
[35]*Galion v. Adams,* 105 Fed. (2d) 943 and 128 Fed. (2d) 411.
[36]105 Fed. (2d) 943.

correctly construed and read the Winsor claims in connection with the specification and drawings.

The Adams cases and the instant case involved entirely different questions and were decided on entirely different records. There is no conflict between the decisions in those cases as would require this Court to undertake the review of the case at bar.

As their fourth point, Point D,[37] petitioners allege that in holding the accused machines not infringed, the lower Court ignored the claims of the Winsor patent, misconstrued the patent and "departed from the usual course of judicial proceedings". This point is so closely related to Point A that we will not repeat what we there said.

Petitioners' contention with respect to the lower Courts' adjudication of non-infringement under this Point as well as Point A is predicted upon the erroneous assumption that in finding non-infringement, the lower Courts disregarded the language of the claims in suit. The contention mistakenly asserts that those Courts completely ignored the claims and compared the accused machines with the specific description and the illustrations found in the specifications. This assumption is entirely unfounded.

What each of the four lower Courts did, and correctly so, was to refer to the specifications and drawings of the patent to ascertain the meaning of the claims. Having referred to the specification and drawings each of the four lower Courts rightly concluded that the combination of parts as defined in the Winsor claims was not found in the

[37]Petition and Brief, pp. 10, 18 and 19.

accused machines. Abundant authority not only supports but requires such interpretation of patent claims.[38]

Likewise, petitioners' assertion that the lower Courts "departed from the usual course of judicial proceedings" is not supported by the record. Petitioners' main contention in this regard is somewhat obscure, but a reading of the decisions of the four lower Courts will disclose that, quite contrary to any departure from the usual course of judicial proceedings, each of the lower Courts followed a long list of judicial precedents in arriving at eminently sound and correct conclusions.

Point D therefore, like Points A, B and C, is without merit and does not warrant a review of this cause by this Court.

The next reason advanced by petitioners, Point E,[39] relates to that portion of the Seventh Circuit Court of Appeals' decision which held the Winsor patent invalid for lack of invention. Little comment need be made on this alleged error, because, as a reading of the well considered opinion of the Court below will demonstrate, in holding the Winsor patent invalid the lower Court followed well settled rules of law, not only as announced by this Honorable Court, but also as expressed by numerous other Circuit Courts of Appeals.[40] The analysis of the prior art is fully and sufficiently discussed in the Court's opinion.

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[38] *American Fruit Growers Inc. v. Brogdex Co.*, 283 U.S. 1, 6;
*Schriber-Schroth Co. v. Cleveland Trust Co.*, 311 U.S. 211, 217;
*Benoit v. Wadley*, 54 Fed. (2d) 1041, 1044 (C.C.A. 7).

[39] Petition and Brief, pp. 11 to 14 and 19 to 25.

[40] R. Vol. IV, pp. 3068, 3069, 3070.

Each of the points and arguments advanced in support of this alleged error was strenuously and thoroughly urged by petitioners in the Court below, not only in the final argument but in the briefs and in the Petition for Rehearing, and each thereof was carefully considered by the lower Court and rejected.

Petitioners' complaint would seem to be that because the lower Court did not specifically comment on each of the contentions urged by them, they were ignored, but obviously it is not necessary nor practicable for a Court in deciding a cause to discuss each and every contention advanced by a party, nor to point out its fallacy or lack of pertinency.

The next reason advanced by petitioners is Point F.[41] The reasoning upon which this point is based is rather hidden, but it would seem that petitioners are here contending that this Court should undertake to review this case because if it is not reversed, Mr. Winsor, the patentee, will not receive any further income from his patent.[42]

Included in the argument on this point is the statement to the effect that unless the decision below is reviewed and reversed, Winsor (it should be petitioner Galion, the owner of the Winsor patent) will have no other opportunity to litigate his patent. This statement is based on the half truth that, except for respondent, all of the *large* road grader manufacturers have taken a license under the Winsor patent. The fallacy of this contention is apparent. This statement admits that there are road grader manu-

[41]Petition and Brief, pp. 14, 15 and 25, 26.
[42]Petition and Brief, p. 26.

facturers who are not licensees of Galion even though not "large", and it could litigate this patent with them if it so desired.

The last point, *urged for the first time in this litigation by petitioners* on the question of invention, is Point G.[43] This argument is based upon the erroneous conclusion that a prior public use under R.S. 4886 (35 U.S.C. 31) cannot be used to show lack of invention, and petitioners contend that the lower Court improperly used two prior public uses, namely the Russell and Oswald machines, each of which had been in public use for more than two years before Winsor filed his application.

A complete answer to this contention is that these two prior uses were but a small and not necessarily the most important part of the prior art relied on by the Court below in arriving at its conclusion. Indeed, as is apparent from the lower Court's decision,[44] it found the Winsor patent did not achieve invention over the prior *patented* art offered in evidence, and referred to in the opinion below, quite apart from and independent of the Russell and Oswald prior uses. So that even if we assume, contrary to the fact, that the lower Court was in error in its use of said prior public uses, that fact avails petitioners nothing here.

Furthermore petitioners, in order to support their contention that the Russell and Oswald prior uses were employed improperly by the lower Court, necessarily *assume* that the Winsor invention date was 1919.[45] The vast

[43]Petition and Brief, pp. 15, and 26 to 28.
[44]R. Vol. IV, pp. 3066, 3067, 3068; 129 Fed. (2d) 70, 71, 72, 73.
[45]Petition and Brief, p. 26.

amount of evidence disproving this date, the fact that in the Third Circuit litigation Winsor was restricted to his filing date for his date of invention,[46] all indicates that petitioners' assumption is wrong and that the lower Court properly included the Russell and Oswald machines in the prior art as a basis for determining lack of invention.

That the lower Court did not err in its use of the Russell and Oswald prior public uses, however, would seem to be most obvious. It is axiomatic in the patent law that in determining whether or not a patent rises to the dignity of invention, the *entire* prior art, consisting of patents, publications and prior public uses must be taken into consideration. Prior public uses are part of the prior art[47] by virtue of the very provisions of R.S. 4886 (35 U.S.C. 31).

None of the authorities cited by petitioners supports the fallacious contention urged by them and no one of them disputes the fundamental rule expressed above and this point is utterly devoid of merit.

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**CONCLUSION.**

In the foregoing comments, we have endeavored to be as brief as possible and have omitted to respond to that portion of the petition and brief relating to controversial fact matters, already decided by the Courts below, such

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[46]R. Vol. III, p. 2025.

[47]*Davison v. Alexander Smith & Sons Carpet Co.*, 22 Fed. Supp. 461, 467;
*Simmons v. Hansen*, 117 Fed. (2d) 49, 52 (C.C.A. 8);
*Jones v. Sykes Metal Lath & Roofing Co.*, 254 Fed. 91, 94 (C.C. A. 6).

as a discussion of the prior art;[48] and of the application of the claims of the Winsor patent to the accused and Adams graders;[49] and to such immaterial subjects as Winsor's financial condition, either in the past or in the future,[50] believing that a consideration or discussion of those fact questions would not assist the Court in determining the questions before it.

The decisions below are correct. They are in accord with the applicable decisions of this Court, and are not in conflict with the decisions of any other Circuit Court of Appeals.

The questions presented involve the application of well settled and long established rules of law to the facts peculiar to this case, are not of general importance and are not worthy of review in this Court.

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

Dated, San Francisco, California,
September 28, 1942.

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[48]Petition and Brief, pp. 20 to 24.
[49]Petition and Brief, cut opposite p. 16.
[50]Petition and Brief, pp. 14, 25 and 26.